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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BURTON F. BOLTUCH,  
Plaintiff and Respondent,  
  
v.  
RENE G. BOISVERT,  
Defendant and Appellant.

A155178

(Alameda County  
Super. Ct. No. RG16837895)

Rene G. Boisvert (Boisvert) appeals from a judgment entered against him after he refused to appear for trial. He contends the judgment is not consistent with facts judicially noticed by the court, the judgment was not supported by the evidence, and the requirements for finding fraud were not met. We will affirm the judgment.

**I. FACTS AND PROCEDURAL HISTORY**

In November 2016, Burton F. Boltuch (Boltuch) filed a verified complaint against Boisvert, individually and as Trustee of the Rene G. Boisvert Revocable Trust dated August 4, 2004, and against Bindy, LLC (Bindy), of which Boisvert was allegedly the sole and managing member.

According to the complaint, Boisvert had borrowed \$100,000 from a third party, Wai Fun Li, in July 2006, as evidenced by an installment promissory note that was secured by certain real property (Property). In November 2014, Boisvert asked Boltuch to lend him funds that he could use toward paying off the loan from Li. In December 2014, Boltuch entered into an “Amendment to Installment Note” (First Amendment) with Boisvert and Bindy: under this agreement, Boltuch loaned Boisvert and Bindy \$105,000,

and they were to repay him that amount, with interest at 8.5 percent and a \$500 loan origination fee, in a combination of monthly installments and a balloon payment due in June 2015. In June 2015, however, Boisvert informed Boltuch that they could not make the balloon payment, leading to a “Second Amendment to Installment Note” (Second Amendment) in July 2015. Under this Second Amendment, Boisvert and Bindy (1) were to pay (and did pay) Boltuch \$42,756.25, representing a principal paydown of \$40,000, accrued interest through June 2015, and the earlier loan initiation fee that was not paid previously, and (2) were to make payments on the \$65,000 principal balance along with 10 percent interest thereon. Both the First Amendment and the Second Amendment entitled the prevailing party in legal proceedings to recover reasonable attorney fees and costs.

Boltuch’s complaint alleged that Boisvert and Bindy breached the Second Amendment by failing to pay as required, and breached the First Amendment and the Second Amendment by, among other things, transferring title to the Property to other persons or entities. In addition, the complaint contained two causes of action for fraud, alleging that Boisvert made material misrepresentations.

Boisvert filed an answer to the complaint. He also filed a cross-complaint and amended cross-complaint against Boltuch for purported violations of the California Fair Debt Collection Practices Act, abusive collection behavior, fraud, and intentional infliction of emotional distress.

Trial was set for June 29, 2018.

A. Boisvert’s Request for a Continuance

Boisvert sent a letter dated June 12, 2018 to the trial judge, the Honorable Julia Spain, stating as follows: “I seek a postponement of the upcoming June 29th trial date. I understand it is a last minute request, but emergency circumstances have surfaced. [¶] I understand that a (ex parte) motion is the standard approach to seek such a request. But being a pro per defendant and facing emergency circumstances, I don’t have the time nor skill to submit the traditional way. [¶] My personal home is in foreclosure. As of last Wednesday, June 6th, the stay on the pending foreclosure was lifted. I am in panic mode

doing all that is possible to save my home. As of today, the sale date is postponed on a weekly basis. [¶] Preparing for a trial or even filing a motion is impossible.” (Original underscoring.) Boisvert inquired, “*may I plead upon the court to grant a reasonable postponement?*” (Original italics.)

On June 25, 2018, Judge Spain sent an email to Boisvert (and Boltuch’s attorney), indicating she had found Boisvert’s letter in the court file while preparing for the trial. Judge Spain stated: “The request for a continuance of the trial date is DENIED. First, a letter request is improper. Second, it does not appear to have been properly served on the court or opposing counsel. Third, although I am sorry to learn of the foreclosure on your home, it is not good cause for a continuance of a trial in a case that has been pending for two years, especially when the trial date has been set for 10 months. [¶] Your court trial will begin at 10am [on] Friday, June 29, 2018 in Dept. 520 as scheduled. Failure to appear will result in a default judgment on either the complaint or cross complaint.” Judge Spain further advised that, as stated in the trial setting order, the parties would have to prepare a settled statement of the proceedings if they did not provide a court reporter.

Boisvert emailed Judge Spain and Boltuch’s counsel on June 27, 2018, stating: “Earlier today, the personal and business crisis in which I first notified the court on June 7, 2018 via email, was resolved. . . . [¶] This crisis was critical in nature and was all consuming in its resolution. [¶] Out of respect to the court and my colleagues, I again notify you that I will not be able to attend the scheduled trial date beginning—Friday, June 29th. Please adjust your calendars accordingly. [¶] I seek a rescheduled court date.” (Original underscoring.)

A few minutes later on June 27, Judge Spain responded to Boisvert (with a copy to Boltuch’s counsel) by email: “Dear Mr. Boisvert, [¶] If you fail to appear for trial as scheduled on Friday, June 29, 2018 at 10am in Dept. 520, your answer and cross complaint will be stricken and your default entered, which will then entitle Mr. Boltuch to a default judgment.”

### B. Boisvert's Request for Judicial Notice

The day before trial, Boisvert filed a request for judicial notice of the following: Bindy had not been served; Boisvert notified the court clerk on June 7, 2018 that a personal and business crisis was pending and his attendance at the June 29 trial was not possible; he notified the court of the same thing by email and mail on June 12; Boltuch was notified of Boisvert's unavailability for trial by mail on June 11; judges have a duty to allow self-represented litigants to be heard according to law and to act in a manner that promotes confidence in the integrity and impartiality of the judiciary (which, he claimed, should have led the court to grant a continuance of the trial so the matter could be heard on the merits); Boisvert had not received any "pre-trial document" from Boltuch's counsel; and under the Second Amendment, Boltuch was to receive 10 percent interest plus a \$500 fee (purportedly making the loan usurious and unenforceable). Attached to the request for judicial notice were documents including a purported certification that Bindy was a limited liability corporation formed under Wyoming law; a June 7 email to Department 520 stating that "a pending foreclosure of my personal home, has been all time consuming to fight for a resolution" and inquiring "[w]hat needs to be done to request (and be granted) a trial postponement;" a June 12 email asking Department 520 to forward an attached letter to the judge; a purported printout of the register of actions; and the Second Amendment.

### C. Trial and Judgment

The case was called for trial as scheduled on June 29, 2018. Boisvert did not appear. Boltuch and his attorney did. The court struck Boisvert's answer to the complaint and Boisvert's cross-complaint with prejudice. As to Boisvert's request for judicial notice, the minute order reads: "Judicial notice is taken." The court proceeded with the trial, Boltuch testified, and the court admitted into evidence the three exhibits Boltuch proffered: the original installment note, the First Amendment, and the Second Amendment. The court ordered judgment for Boltuch.

The judgment, entered on July 2, 2018, requires Boisvert and Bindy to pay Boltuch \$65,000 in unpaid principal, \$13,864.39 in unpaid interest, \$195 in late fees,

\$50,000 for fraud, \$50,000 for punitive damages, \$67,000 in attorney's fees, \$3,626 for sanctions previously ordered by the court but which had not been paid, and \$4,162.85 in costs.

D. Boisvert's New Trial Motion

On July 16, 2018, Boisvert filed a notice of his intention to move for a new trial on various grounds. He filed his new trial motion on July 26, 2018, and the court denied it on August 24, 2018.

E. Appeal

Boisvert filed a notice of appeal from the judgment. In his notice designating the record on appeal, however, Boisvert elected to proceed without a record of the oral proceedings, checking the box next to the warning, "I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings."

II. DISCUSSION

Boisvert organizes his issues on appeal under three headings, which loosely refer to judicial notice, sufficiency of the evidence, and Boltuch's fraud claim. We address each in turn.

A. Judicial Notice

Boisvert's first set of issues pertains to the significance of facts judicially noticed by the court. His heading for this section of his opening brief states: "When judicial notice is granted by the court at trial, and the facts therein accepted as sufficiently undisputed & conclusive, can the court then ignore those facts and not apply such facts to the judgment rendered?" His arguments are meritless.

1. Service on Bindy

Boisvert first complains that "judgment was erroneously entered against Bindy" even though the court took judicial notice that Bindy was not served with any legal documents. However, Boisvert has no standing to assert error on behalf of Bindy. (See *In re Desiree M.* (2010) 181 Cal.App.4th 329, 333.) Nor has Boisvert established that the

failure to serve Bindy prejudiced Boisvert or resulted in the judgment being entered against him.

## 2. Pre-Trial Documents

Boisvert next complains that the court proceeded with the trial even though it took judicial notice that he did not receive Boltuch's mandatory "pre-trial documents" three days before the trial date, as required by local rules. (See Super. Ct. Alameda County, Local Rules, rule 3.35(b) [requiring exchange of exhibit list three days before trial].)

Boisvert's argument is unavailing. A failure to abide by rule 3.35(b) does not compel a continuance of the trial date, and Boisvert never filed a motion for a continuance on that ground anyway. Furthermore, although rule 3.35(b) provides that the failure to timely disclose or exchange a copy of an exhibit "may" result in its exclusion at trial, the court retains discretion to admit the exhibit into evidence. Here, admitting Boltuch's exhibits into evidence was plainly within the court's discretion, since the note and amendments were critical to the parties' dispute, their introduction would be of no surprise to anyone, Boisvert did not even show up for the trial, and there is no indication (or argument by Boisvert) that the exhibits lacked the requisite evidentiary foundation.

## 3. Usury

The court took judicial notice that the Second Amendment charged 10 percent interest plus payment of a \$500 fee. Boisvert argues that, since "interest" is defined as all compensation for use of loaned funds (Civ. Code, § 1915), charging both 10 percent interest and a \$500 fee meant that the interest rate exceeded the 10 percent limit generally allowed under article XV of the California Constitution, so the contract was usurious and therefore unenforceable.

This argument is meritless as well. Even if the trial court could properly take judicial notice of the interest rate and amount of the fee, the First Amendment and Second Amendment, attached to Boltuch's verified complaint and admitted at trial, show that the \$500 fee was actually part of Boisvert's accrued indebtedness under the *First* Amendment, which only charged 8.5 percent interest. Although the Second Amendment required payment of that fee to clear up Boisvert's *pre-existing* indebtedness, the fee was

plainly not associated with the credit extended on the remaining principal balance at 10 percent interest. Boisvert fails to establish a usurious interest rate.

### B. Sufficiency of the Evidence

The heading for Boisvert’s second set of issues reads: “Does ‘Black Letter Law’ require the trial court to apply the proper law to the facts in determining sufficiency of evidence and damages and fees? May the trial court delegate this duty to the adversary’s attorney?”

There is no indication that the trial court failed to apply the proper law to the facts or delegated any duty to opposing counsel. To the contrary, the record (what there is of it) shows that the court considered the evidence and, based on that evidence, rendered its judgment. It is presumed the court followed and applied the law. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 (*Jameson*).) Because Boisvert did not provide a reporter’s transcript of the trial, he fails to establish that the evidence did not support the judgment or overcome the presumption that the judgment is correct. (*Ibid.*; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992.)

#### 1. Striking Boisvert’s Pleadings

Boisvert argues that the court should not have stricken his answer and cross-complaint, referring us to Code of Civil Procedure section 436. His argument, however, is irrelevant. The matter proceeded to trial and the judgment was based on the evidence, not the lack of Boisvert’s pleadings. Put another way, he fails to establish that the result would have been any different if his pleadings had not been stricken. Any error in striking them was accordingly harmless.

#### 2. Sufficiency of the Evidence

Boisvert argues that the three exhibits admitted into evidence were insufficient for Boltuch to prevail, and there was no financial or “numerical” accounting supporting the judgment. However, Boltuch offered oral testimony in addition to these three exhibits. Because Boisvert fails to provide a reporter’s transcript of the oral proceedings, we must conclude that the evidence presented at the trial, including Boltuch’s testimony, was sufficient to support the judgment. (*Jameson, supra*, 5 Cal.5th at pp. 608–610.)

Boisvert further contends in his opening brief: “It is being argued here that the judge erred fundamentally in her approach in concluding she could find the facts necessary to decide the issues without considering all of the evidence before her and without resolving the conflicts in that evidence. [¶] Simply, the appellant argues that the judge did not find the facts nor evidence necessary to decide the case.” However, there is no indication that the court did not consider the entirety of the evidence presented and resolve any evidentiary conflict. The judgment is presumed correct, and Boisvert has not established otherwise. (*Jameson, supra*, 5 Cal.5th at pp. 608–609.)

### 3. New Trial

Boisvert protests the denial of his motion for a new trial, which was brought on various grounds including excessive damages. Because, among other things, he does not provide us with the testimony set forth at the trial, he fails to establish that the evidence was insufficient, the damages were excessive, or any other basis for a new trial.

### 4. Continuance

Boisvert argues that the trial court has a duty to prevent a miscarriage of justice, claiming Judge Spain took judicial notice of “Fact #4” – that judges have a duty to allow self-represented litigants to be heard according to the law. In his opening brief, Boisvert suggests the court should have therefore granted a postponement of the trial so the matter could be heard on the merits. In his reply brief, however, he insists “a trial continuance was NOT one of the three issues on appeal.” In any event, the court did not err in denying a continuance.

Rule 3.1332(a) of the California Rules of Court states: “To ensure the prompt disposition of civil cases, *the dates assigned for a trial are firm*. All parties and their counsel must regard the date set for trial as certain.” (Italics added.) If a party needs a continuance, rule 3.1332(b) mandates that the party “*must* make the request for a continuance by a noticed motion or an ex parte application under the rules in chapter 4 of this division, with supporting declarations.” (Italics added.) Boisvert did not do so. Rule 3.1332(b) also requires the motion or application to be made “as soon as reasonably

practical once the necessity for the continuance is discovered.” Here, Boisvert failed to show that he could not have requested a continuance earlier.

Furthermore, Boisvert failed to establish good cause for a continuance. While rule 3.1332(c) sets forth circumstances that might indicate good cause, Boisvert did not then—and does not now—establish that any of them applied. To the contrary, Boisvert’s last correspondence to the court stated that his personal and business crisis was “resolved” but, despite the court’s denial of his informal request for a continuance, he was still not going to show up for trial, and the court and Boltuch should modify their calendars. It does not work that way, and the fact that Boisvert was not represented by an attorney does not entitle him to special treatment. (E.g., *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985.)

#### C. Fraud

Boisvert’s third heading reads: “Can fraud be awarded at trial when the legal requirements needed to support fraud are absent at trial?” He argues that Boltuch “did not bring a single piece of evidence to their pleadings nor to their trial to support fraud, [much] *less all five required elements*, yet the court gave verdict to the plaintiff for fraud for \$50,000.” (Original italics.) Boisvert’s challenge to the judgment in this regard is merely another argument about the sufficiency of the evidence, which is barred by the absence of a reporter’s transcript. Boisvert fails to establish error.

### III. DISPOSITION

The judgment is affirmed.

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NEEDHAM, J.

We concur.

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SIMONS, Acting P. J.

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BURNS, J.